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No. 87-1500

IN THE

Supreme Court of the United States

October Term, 1987

GERTRUDE BROOKS SCHUYT,

Petitioner,

vs.

ROWE PRICE PRIME RESERVE FUND, INC., T. ROWE PRICE ASSOCIATES, INC., CARTER O. HOFFMAN, EDWARD A. TABER, III, and GEORGE J. COLLINS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF OF PETITIONER

DANIEL W. KRASNER
270 Madison Avenue
New York, New York 10016
(212) 689-5300
Attorney for Petitioner

Of Counsel:

JEFFREY G. SMITH
WOLF HALDENSTEIN ADLER
FREEMAN & HERZ
270 Madison Avenue
New York, New York 10016

ROBERT STULL
STULL, STULL & BRODY
6 East 49th Street
New York, New York 10017

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Petitioner argues that the writ should issue because the deprivation of her right to a jury trial under section

36(b) of the ICA involves a question of exceptional constitutional importance. Respondents do not challenge that contention, but sidestep it and argue that the petition should be denied because there is no conflict among the circuits* and, under Tull v. United States, 481 U.S. __, 95 L.Ed.2d 365, 375 (1987), the courts below were correct. Respondents' first argument, by failing to address petitioner's point and, instead, refuting

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* Petitioner notes that facially, at least, the First Circuit's decision in In re Evangelist, 760 F.2d 27 (1st Cir. 1985), which ruled that all claims under 36(b) were equitable and the Second Circuit's decision in In re Gartenberg, 636 F.2d 16 (2d Cir. 1980), cert. denied, 451 U.S. 910 (1981), which left open the possibility of a legal claim for excessive fees, are in conflict. Petitioner agrees with respondents that the practical effect of the decisions below is to make Gartenberg mean that no claim at law is available under § 36(b) despite Congress's stated intention to create an action at law for damages.

an argument not made, essentially concedes that the issue is one of exceptional constitutional importance. Respondents' second argument, from Tull, is simply wrong.

The test employed below for analyzing the seventh amendment right to a jury trial in an action under section 36(b) was the test set forth in In re Gartenberg, 636 F.2d 16, 18 (2d Cir. 1980), cert. denied, 451 U.S. 910 (1981):

> To determine whether petitioner's action is in law or equity, we must look to the relief which he seeks, not the statute which gives him a right to sue. We must examine the nature of the issue to be tried in the light of the historic legal and equitable practices applicable to issues of a similar nature . . . . (citations omitted).

On the basis that section 36(b) merely codified the traditional fiduciary relationship between investment companies and their advisers, the Second Circuit found that the "issue . . . involve[d] the

equitable inquiry whether the . . . adviser violated its fiduciary obligations by charging an exorbitant fee." Id. That analysis led to the holding that Gartenberg's action under section 36(b) was equitable, and did not require a jury trial. But that test was superseded by the later decision of this Court in Tull.

Unlike the Gartenberg analysis, the Tull test is two-pronged, and requires consideration of (a) the nature of the action, and (b) the relief sought:

> To determine whether a statutory action is more similar to cases that were tried in courts of law than to suits tried in courts of equity or admiralty, the Court must examine both the nature of the action and of the remedy sought.

95 L.Ed.2d at 373.

As petitioner noted in her opening brief, since there are no exact eighteenth century analogies to the section 36(b) action, the first part of the Tull test

should focus on the statutory language, as discussed in the Petition. Respondents totally ignore the argument from statutory language. They focus instead on the secondary argument, i.e., the language of the pleading. Petitioner, of course, relies not on her choice of the word "damages", in her pleading, but rather on Congress's.

As distinguished from Gartenberg, the Tull test focuses on both the nature of the action and the relief sought. Moreover, the test does not center on the "issue to be tried," as the Second Circuit held in Gartenberg, 636 F.2d at 18. Thus, in searching for an analogy appropriate for the first prong of the analysis, the nature of the claim should be examined

historically.*

An action under section 36(b) is most comparable to an action for corporate waste. Indeed, the very reason for the enactment of section 36(b) was that Congress found that the corporate waste test, previously applied to actions against investment advisers, had been unrealistically high. S. Rep. No. 91-184, at 5, 91st Cong. 2d Sess., reprinted in [1970] U.S. Code & Ad. News 4897, 4901. Section 36(b), thus, changed the

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* Tull involved a government suit under the Clean Water Act, 33 U.S.C. § 1319(b), for injunctive relief and civil penalties. 95 L.Ed.2d at 370. Analyzing the nature of that new action, the Court found that it resembled both a legal action in debt (as the petitioner contended), and also an equitable action to abate a public nuisance (as the government contended). However, the Court did not find it necessary to choose one over the other because it found the relief sought -- a civil penalty of $22 million -- predominantly legal.

"standards employed by courts to judge [adviser's] fees." Daily Income Fund, Inc. v. Fox, 464 U.S. 523, 537 (1984). See also Weiss v. Temporary Inv. Fund, 692 F.2d 928, 933 (3d Cir. 1982), vacated on other grounds, 465 U.S. 1001 (1984) ("By increasing the standard of care owed by the advisers, Congress sought to ease the difficult burden faced by shareholders trying to prove that advisory contracts violated common law prohibitions against 'corporate waste.").

By enacting section 36(b), Congress lowered the standard to a fiduciary level, so that recovery of excessive compensation would be facilitated. The nature of the underlying action -- as always -- remained one for corporate waste. See, e.g., Rogers v. Hill, 289 U.S. 582, 591 (1933) (large salaries may "amount to spoliation or waste of corporate property"); Fogelson

v. American Woolen Co., 170 F.2d 660, 663 (2d Cir. 1948) ("size of a bonus may raise a justiciable inquiry as to whether it amounts to spoliation or waste of corporate property"); Teren v. Howard, Jr., 322 F.2d 949, 953 (9th Cir. 1963) (unreasonable compensation to officers is corporate waste); Kann v. Keystone Resources, Inc., 575 F. Supp. 1084, 1090 (W.D. Pa. 1983).

The Second Circuit has quite recently held that an action for corporate waste is properly viewed "as one asserting a claim in law for the loss of enjoyment of property." Lewis v. S.L.& E., Inc., 831 F.2d 37, 39 (2d Cir. 1987) (emphasis added). Indeed, in Korenstein v. Dreyfus Corp., No. 77 Civ. 2521 (S.D.N.Y. June 28, 1979) (available on LEXIS, Genfed library, Dist file), the district court specifically granted a jury trial on a

claim of corporate waste.

Section 36(b), thus, reduced the standard for judging corporate waste in connection with advisory fees and conferred standing on the SEC and security holders to bring an action under the new test. Daily Income Fund, 464 U.S. at 541. These changes simply improved the efficacy of the earlier actions for corporate waste, legal actions. Therefore, the historic precursor, if not the exact analog, of the action contemplated by section 36(b) was an action at law.

The second prong of the Tull test calls for an analysis of the relief sought. In this context, it is significant that what is relevant is the relief which is sought in the action before the Court, and not other relief that might be authorized by the statute.

Thus, although in Tull the government sought both equitable and legal relief, the legal claim was determinative of the jury issue. Tull, 95 L.Ed.2d at 378. In Gartenberg only an accounting was sought, but, here damages in the form expressly authorized by the statute, within the limits proscribed, were sought.

In this light, it is scarcely arguable that the remedy sought in the case at bar is legal in nature. The relief sought in the action is damages, a legal remedy. Pernell v. Southall Realty, 416 U.S. 363, 370 (1974) (actions for damages are actions at law triable to a jury); Curtis v. Loether, 415 U.S. 189, 1986 (1974) ("damages [are] the traditional form of relief offered in the courts of law"); National Union Elec. Corp. v. Wilson, 434 F.2d 986, 988 (6th Cir. 1970) (corporate claim for damages

against ex-officers for breach of fiduciary duty triable by jury); DePinto v. Provident Sec. Life Ins. Co., 323 F.2d 826, 836-37 (9th Cir. 1963), cert. denied, 376 U.S. 950 (1964) (corporate claim for damages against directors for breach of fiduciary duty triable before jury); Sibley v. Fulton DeKalb Collection Serv., 677 F.2d 830, 834 (11th Cir. 1982) ("We conclude that the Act's reference to an allowance of damages by the court must be construed to embody the right of trial by jury.").

Both prongs of the Tull test lead to the same conclusion: section 36(b) creates actions at law for the relief sought here. We, therefore, submit that the case at bar should have been tried to a jury under the seventh amendment.

CONCLUSION

The petition for a writ of certiorari should be granted and the judgments and order below should be reversed.

Respectfully submitted,

Daniel W. Krasner
270 Madison Avenue
New York, New York 10016
(212) 689-5300
Attorney for Petitioner

Of Counsel:

Jeffrey G. Smith
Wolf Haldenstein Adler Freeman & Herz
270 Madison Avenue
New York, New York 10016

Robert Stull
Stull, Stull & Brody
6 East 49th Street
New York, New York 10017